92-609

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY J. NACHTIGAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Art. III, § 2, Cl. 3 of the Constitution or the Jury Trial Clause of the Sixth Amendment requires a trial by jury for the offense of driving under the influence of alcohol, where the maximum authorized penalty is six months' imprisonment and a $5,000 fine.

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-4a, is unpublished, but the judgment is noted at 953 F.2d 1389 (Table). The opinions of the magistrate, App., *infra*, 5a-9a, and the district court, App., *infra*, 10a-20a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1992. A petition for rehearing was denied on July 10, 1992. App., *infra*, 21a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article III, § 2, Cl. 3, and the Sixth Amendment of the Constitution; 16 U.S.C. 3; 18 U.S.C. 3571 (b)(6) and (e); and 36 C.F.R. 1.3(a) and 4.23 (a)(1) are *reprinted in* App., *infra*, 22a-23a.

STATEMENT

1. On February 15, 1990, respondent was charged by information in the United States District Court for the Eastern District of California with operating a motor vehicle in Yosemite National Park while under the influence of alcohol, in violation of 36 C.F.R. 4.23(a)(1) and 36 C.F.R. 4.23(a)(2). App., *infra*, 2a, 6a, 10a-11a & n.1. Those offenses are Class B misdemeanors, see 18 U.S.C. 3559(a)(1); they carry a maximum penalty of six months' imprisonment, 36 C.F.R. 1.3(a); 18 U.S.C. 3581(b)(7), and a fine of $5,000, 18 U.S.C. 3571(b)(6) and (e). As an alternative to a term of imprisonment, a term of probation of not more than five years may be imposed. 18 U.S.C. 3561(a)(3) and (b)(2).

2. Respondent moved for a jury trial. A magistrate denied the motion, reasoning that, under *Blanton* v. *City of North Las Vegas*, 489 U.S. 538 (1989), the federal driving-under-the-influence (DUI) offense is a "petty offense"—*i.e.*, one for which the Sixth Amendment does not require a jury trial. App., *infra*, 6a. In *Blanton*, this Court held that an offense carrying a maximum prison term of six months or less is presumed to be a petty offense, and that a defendant can overcome the presumption "only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period

of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." 489 U.S. at 543.[1] The magistrate rejected respondent's contention that he faced additional penalties sufficient to elevate his DUI

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[1] This Court's conclusion in *Blanton* that Art. III, § 2, Cl. 3 and the Sixth Amendment should not be read literally, so as to require a jury trial in every "criminal prosecution," did not state a novel rule of law. The English common law permitted a wide range of petty or minor offenses to be resolved summarily before justices of the peace without a jury, and that practice was generally followed in the American colonies. Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926). In deciding whether a jury trial was constitutionally required, this Court originally looked to the nature and treatment of the offense at common law and the gravity of the conduct involved. See *Callan* v. *Wilson*, 127 U.S. 540 (1888); *Schick* v. *United States*, 195 U.S. 65 (1904); *District of Columbia* v. *Colts*, 282 U.S. 63 (1930). In its more recent cases, the Court has sought objective criteria for deciding whether a particular offense is "petty" or "serious" for jury trial purposes. In so doing, the Court has focused on the maximum penalty authorized by law, and has determined that six months' confinement is the dividing line between "petty" and "serious" offenses. See *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937); *Duncan* v. *Louisiana*, 391 U.S. 145, 159-162 (1968); *Baldwin* v. *New York*, 399 U.S. 66, 68-74 (1970) (plurality opinion); compare *Frank* v. *United States*, 395 U.S. 147, 149 (1969) ("In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion"; in contempt cases, however, where there is no statutory maximum sentence, the guide is the penalty actually imposed.). *Blanton*, this Court's most recent treatment of the issue, adopted the presumption stated in the text.

charge from a petty to a serious offense. App., *infra*, at 7a-9a.[2]

Respondent was tried by the magistrate and was convicted of operating a motor vehicle while under the influence of alcohol; he was acquitted of the other charge. He was fined $750 and placed on unsupervised probation for one year. Gov't C.A. Br. 4.

3. Respondent appealed to the district court, which reversed. App., *infra*, 10a-20a. The court explained that, in its view, "*Blanton* represents a marked departure from prior Supreme Court precedents" such as *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and *Baldwin* v. *New York*, 399 U.S. 66 (1970). App., *infra*, 15a-16a; see *id.* at 16a-17a. Instead of looking to *Blanton*, the district court relied on *United States* v. *Craner*, 652 F.2d 23 (1981), a Ninth Circuit decision predating *Blanton*. In *Craner*, the Ninth Circuit held that a jury trial was required for a federal DUI

[2] Respondent argued that interest might be assessed on the $5,000 fine, that restitution might be ordered as a condition of probation, and that up to 4½ years of "incarceration" in a federal community treatment center might be ordered as further conditions of probation. The magistrate ruled that neither interest nor restitution would indicate a determination by Congress that the offense was "serious," since Congress had legislated such penalties for crimes that it had designated as petty offenses. App., *infra*, 8a. The magistrate characterized respondent's allegation that he faced an additional "incarceration" penalty as "both incorrect and disingenuous," noting that respondent had "cite[d] no authority for the proposition that custodial alcohol or drug treatment may be imposed as a condition of probation for a time period in excess of the [six] month maximum period of incarceration," and that "a defendant would be entitled to time credits for any such ordered treatment which significantly limited [his] freedom and could be properly termed incarceration." *Id.* at 9a.

charge carrying a maximum penalty of six months' confinement, a $500 fine, payment of costs, and the possible loss of one's driver's license. App., *infra*, 17a, 20a. Although the district court acknowledged that *Blanton* was "at variance" with *Craner*, *id.* at 17a, the court concluded that it was obliged to follow *Craner*, since this Court in *Blanton* "did not expressly overrule" *Craner*. *Id.* at 20a.

4. The court of appeals affirmed. App., *infra*, 1a-4a. The panel regarded *Blanton* as "inapposite," *id.* at 4a, and held that "*Craner* remains the law of this Circuit," *ibid.*, "and controls this case," *id.* at 3a. The panel purported to distinguish *Blanton* on the ground that *Blanton* involved a legislative determination that the offense was not a serious one, while in this case, as in *Craner*, "[t]here is no controlling legislative determination," *id.* at 3a-4a, because "the six month prison term is dictated by the Secretary of the Interior, not Congress," *id.* at 4a. The court also considered it significant that the Secretary, having been vested by Congress under 16 U.S.C. 3 with power to fix six months as the maximum sentence for any offense, chose for DUI "the harshest penalty available to him," App., *infra*, 4a. Finally, the panel observed that, "to the extent that legislative determinations are relevant, *Craner* points out that the legislatures of seven states in our Circuit have determined that drunk driving is a 'serious' offense to which the right to a jury trial attaches." *Ibid.* Accordingly, the court held that respondent was entitled to a trial by jury. *Ibid.*[3]

[3] The court noted that the DUI charge exposed defendant not only to a maximum confinement term of six months and a maximum fine of $5,000, but also to "a maximum proba-

REASONS FOR GRANTING THE PETITION

The decision below is irreconcilable with this Court's unanimous 1989 decision in *Blanton* v. *City of North Las Vegas*, 489 U.S. 538. There, this Court held that an offense carrying a maximum prison term of six months or less is presumed to be a "petty offense" and hence not subject to the jury trial requirement of Art. III, § 2, Cl. 3 and the Sixth Amendment. 489 U.S. at 543. A defendant can overcome that presumption, the Court ruled, "only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Ibid.*[4] The Court further stated that in discerning a legislature's intent

tionary period of five years during which [he] is subject to a host of possible restrictions and conditions, 18 U.S.C. §§ 3561(b)(2), 3563(a)(1), (b)." App., *infra*, 2a. The panel did not cite or discuss 18 U.S.C. 3561(a)(3), which prohibits imposition of a term of probation in any case in which the defendant "is sentenced at the same time to a term of imprisonment for the same or a different offense." In any event, the court did not purport to distinguish *Blanton* on the ground that respondent was exposed to more onerous penalties than those at issue in that case.

[4] This Court found that the presumption had not been overcome with respect to the DUI statute at issue in *Blanton*, even though, in addition to a maximum authorized prison term of six months (with an alternative penalty of 48 hours of community service to be performed while the DUI offender was identifiably dressed as such), the statute prescribed a fine of up to $1,000, automatic suspension of the offender's driver's license for 90 days, and attendance at an alcohol abuse education course at the offender's expense. 489 U.S. at 543-545.

under that standard, the intent of other legislatures with respect to similar offenses is irrelevant. *Id.* at 545 n.11.

In this case, the Ninth Circuit disregarded both the result and the reasoning of *Blanton*. The Ninth Circuit embraced an approach that this Court rejected in *Blanton* and that conflicts with the analysis followed by every other court of appeals to consider this issue since *Blanton* was decided. In light of this disagreement over a question that arises with considerable frequency, review by this Court is warranted. Because the Ninth Circuit's decision is so clearly wrong, the Court may wish to consider summary reversal.

1. The Ninth Circuit did not purport to distinguish *Blanton* on the ground that the authorized penalties there were less onerous than those set for violations of 36 C.F.R. 4.23(a)(1); indeed, no such distinction could be drawn. The maximum authorized term of imprisonment both in *Blanton* and here was six months. The maximum fine for the federal DUI offense is $4,000 greater than the authorized fine in *Blanton*,[5] but that difference is not so significant as to render the federal DUI offense "serious" and thereby to require a jury trial. See *United States* v. *Paternostro*, 966 F.2d 907, 913 (5th Cir. 1992). Incarceration and fines are "intrinsically different," as the Court explained in *Blanton*, and a fine "cannot approximate in severity the loss of liberty that a prison term entails." 489 U.S. at 542 (quoting *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975)). Indeed,

[5] The maximum fine for the federal DUI offense is $5,000, while the maximum fine for the DUI offense in *Blanton* was $1,000.

Blanton strongly suggested that the $5,000 fine authorized by Congress for petty offenses would not render an offense "serious" for jury trial purposes. 489 U.S. at 544-545; see 18 U.S.C. 19 (defining a "petty offense" in the case of an individual defendant as one for which the maximum fine is no greater than $5,000 (the amount set for petty offenses in 18 U.S.C. 3571(b)(6) (Class B and C misdemeanors) and 3571(7) (infractions)); 18 U.S.C. 1 (Supp. IV 1986) (same), cited at *Blanton*, 489 U.S. at 544-545.[6]

Instead of distinguishing *Blanton*, the Ninth Circuit simply declared that *Blanton* was "inapposite" to this case, App., *infra*, 4a, for two reasons: In the court's view, the legislature had not set the maximum penalty for violations of the federal regulation, and most of the States that make up the Ninth Circuit deem drunk driving sufficiently serious to warrant a

[6] Nor does the alternative possible penalty of probation render the federal DUI offense a "serious" one for jury trial purposes. See *United States* v. *Paternostro*, 966 F.2d at 913 (rejecting argument that possibility of five-year probationary period transforms a petty offense into a serious one). Even when probation results in "a significant infringement of personal freedom," it is not comparable to incarceration, which remains "the most powerful indication of whether an offense is serious." *Blanton*, 489 U.S. at 542 (internal citation and quotation marks omitted). The conditions of probation that a court may impose for a federal misdemeanor or infraction—such as residing at an institution offering treatment for drug or alcohol dependency, 18 U.S.C. 3563(b)(10); remaining in the custody of the Bureau of Prisons during nights and weekends for a period not exceeding the term of imprisonment authorized for the offense, see 18 U.S.C. 3563(b)(11); or residing at a community correctional facility, see 18 U.S.C. 3563(b)(12)—are not sufficiently onerous to convert all federal crimes into "serious offenses" for jury trial purposes.

jury trial. *Id.* at 3a-4a. The first rationale is without merit, and this Court in *Blanton* explicitly rejected the second one.

a. The court of appeals concluded that "[t]here is no controlling legislative determination here" as to the seriousness of the DUI offense, because the six-month prison term was fixed by the Secretary of the Interior, rather than by Congress. App., *infra*, 4a. That conclusion, however, ignores Congress's antecedent decision to limit to six months the confinement term that the Secretary can set for violations of his regulations. See 16 U.S.C. 3. Although the Ninth Circuit perceived some constitutional significance in the Secretary's decision to impose "the harshest penalty available to him," App., *infra*, 4a, the maximum penalties chosen by the Secretary simply tracked the maximum penalties fixed by Congress. Moreover, the Secretary did not single out DUI for especially harsh treatment. The six-month maximum term of confinement was made applicable generally to virtually all offenses committed in national parks, see 36 C.F.R. 1.3(a), including such offenses as digging for bait, 36 C.F.R. 2.3(d)(6), and camping within 25 feet of a road, 36 C.F.R. 2.10(b)(3).

The six-month maximum term of incarceration is constitutionally significant not because the Secretary chose it, but because, as *Blanton* teaches, that limitation triggers the presumption that a jury trial is not required for any offense to which it applies. 489 U.S. at 543. Because the court of appeals did not—and could not—find that any additional authorized punishment was sufficiently onerous to overcome that presumption, respondent was not entitled to a jury trial. See *ibid.* (when the maximum authorized term of confinement is six months, the Constitution

requires a jury trial only in that "rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless 'do not puncture the 6-month incarceration line.' ").[7]

b. The court of appeals' second rationale for holding that the federal DUI offense is not a "petty offense"—that "the legislatures of seven states in [the Ninth] Circuit have determined that drunk driving is a 'serious' offense to which the right to a jury trial attaches," App., *infra*, 4a—is even less tenable than the first. In *Blanton*, this Court expressly declined to review the statutory penalties for drunk driving in other States as a basis for determining whether Nevada's DUI offense was "serious." 489 U.S. at 545 n.11. As the Court explained, "[t]he question is not whether other States consider drunken driving a 'serious' offense, but whether Nevada does." *Ibid.*; accord *United States* v. *Bencheck*, 926 F.2d

[7] In any event, *Blanton* suggests that if the legislature has not itself established a maximum sentence, as in a prosecution for criminal contempt, "the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense." 489 U.S. at 542 n.6 (quoting *Frank* v. *United States*, 395 U.S. 147, 149 (1969)); see *United States* v. *Musser*, 873 F.2d 1513, aff'd on denial of reh'g, 883 F.2d 84, 85 (D.C. Cir.) (even if the six-month maximum prison term applicable to the violation of a Department of Interior regulation concerning unattended signs did not make the offense "petty" because the regulation was not promulgated by Congress, the court would not automatically deem the offense "serious"; instead, the availability of a jury trial would depend on the sentence actually imposed), cert. denied, 493 U.S. 983 (1989). Respondent was sentenced to one year of unsupervised probation and fined $750. Thus, even if the choice of six months' imprisonment as the penalty for violations of the federal DUI regulations was not a "legislative determination" within the meaning of *Blanton*, 489 U.S. at 543, respondent was not entitled to a jury trial.

1512, 1517 (10th Cir. 1991) ("the *Blanton* Court refused an invitation to survey and rely on state law" to determine the seriousness of an offense). Similarly, the relevant measure of the "seriousness" of the federal DUI offense for purposes of the right to a jury trial is not the "seriousness" of state drunk driving offenses, but is Congress's judgment, as reflected by the maximum term of imprisonment that Congress has permitted the Secretary to set for that offense and any additional penalties that Congress has affixed to it.

c. The Ninth Circuit acknowledged, App., *infra*, 2a-4a, that it derived the two rationales for its decision from its pre-*Blanton* decision in *United States* v. *Craner*, 652 F.2d 23 (1981). In *Craner*, the court held that a jury trial was constitutionally required for violations of former 16 C.F.R. 4.6 (1980), which prohibited driving under the influence of intoxicating liquor or drugs in park areas. That crime carried the same maximum penalty of six months' incarceration that is found in 36 C.F.R. 4.23(a)(1), which is at issue here. In this case, the court of appeals held that "*Craner* is indistinguishable in any legally meaningful sense from the case at hand" and "remains the law of this Circuit." App., *infra*, 3a, 4a. But *Craner* is no longer good law after *Blanton*, because *Blanton* expressly disapproved the authority on which *Craner* was premised.

The Ninth Circuit in *Craner* relied heavily on *District of Columbia* v. *Colts*, 282 U.S. 63 (1930), which held that reckless driving was a serious offense requiring trial by jury. See *Craner*, 652 F.2d at 26 ("There is no legally meaningful distinction between the present case and *Colts*."). *Craner* noted that this Court had "never repudiated *Colts*." *Ibid.* In *Blanton*, however, this Court contrasted its current approach

to the jury trial requirement with its approach to that issue in *Colts*, which had "focused on the nature of the offense and on whether it was triable by a jury at common law." 489 U.S. at 541. In *Blanton*, this Court observed that, in recent years, it had sought "objective indications of the seriousness with which society regards the offense," *ibid.* (quoting *Frank* v. *United States*, 395 U.S. 147, 148 (1969)), and had found "the most relevant such criteria in the severity of the maximum authorized penalty," 489 U.S. at 541 (quoting *Baldwin* v. *New York*, 399 U.S. 66, 68 (1970) (plurality opinion), and citing *Duncan* v. *Louisiana*, 391 U.S. 145, 159 (1968)). See also 489 U.S. at 542 (to determine whether a jury trial is required, "[p]rimary emphasis * * * must be placed on the maximum authorized period of incarceration," because it is "the most powerful indication of whether an offense is 'serious.'"). The Ninth Circuit's continued reliance on *Craner* in the face of this Court's express rejection in *Blanton* of the reasoning on which *Craner* was based is further proof that the decision below is irreconcilable with *Blanton*.

2. The Ninth Circuit's decision is inconsistent with the post-*Blanton* decisions of several other circuits. Unlike the Ninth Circuit, those courts have applied *Blanton's* analysis to hold that federal regulatory crimes carrying a maximum penalty of six months' incarceration and a $5,000 fine are petty offenses and therefore not subject to a jury trial. See *United States* v. *Paternostro*, 966 F.2d 907, 913 (5th Cir. 1992) (permit violation under 36 C.F.R. 327.19); *United States* v. *Harper*, 946 F.2d 1373, 1374 (8th Cir. 1991) (placing an unauthorized structure in a national forest, in violation of 36 C.F.R. 261.10(a), and camping for more than 30 days, in violation of

36 C.F.R. 261.58(a)), cert denied, 112 S. Ct. 1506 (1992); *United States* v. *Musser*, 873 F.2d 1513, 1516 (leaving a sign unattended in a national park, in violation of 36 C.F.R. 7.96(g)(5)(x)(B)(2)), aff'd on denial of reh'g, 883 F.2d 84 (D.C. Cir.), cert. denied, 493 US. 983 (1989).[8] In none of those cases did the courts find any significance in the fact that the Secretary of the Interior fixed the statutory maximum penalty within a range set by Congress; nor did they look to how other States treated the offense in question.

Other courts have likewise followed *Blanton* in holding the right to a jury trial does not apply to cases carrying a maximum penalty of six months' incarceration, even when the offenses and penalties are similar to those at issue here. See *United States* v. *LaValley*, 957 F.2d 1309, 1312-1313 (6th Cir. 1992) (wrongful entry of a military base, in violation of 18 U.S.C. 1382; maximum authorized penalty of six months' confinement, $5,000 fine, and five years' supervised release); *United States* v. *Bencheck*, 926 F.2d 1512, 1514-1520 (10th Cir. 1991) (several misdemeanors (various traffic offenses and assault on a police officer) under Oklahoma law and the Assimilative Crimes Act, 18 U.S.C. 13; maximum authorized penalty for each offense of six months' confinement, $500 fine, or both); *United States* v. *Garner*, 874 F.2d 1510, 1512 (11th Cir. 1989) (DUI offense under Florida law and the Assimilative Crimes Act; maximum penalties are "similar" to those in *Blanton*, although Florida re-

[8] In *Musser*, the maximum fine was only $500 because 18 U.S.C. 3571(e), which provides for a fine of up to $5,000 for all federal misdemeanors not specifically excluded from the operation of that statute, had not gone into effect at the time of the offenses at issue in that case.

voked license for a longer period and required 50 hours of community service); *United States* v. *Spivey*, 781 F. Supp. 676, 679 (D. Haw. 1991) (DUI in violation of Hawaii law and the Assimilative Crimes Act; maximum authorized penalty of six months' confinement and $1,000 fine); *Stevenson* v. *District of Columbia*, 562 A.2d 622, 623 (D.C. 1989) (DUI under D.C. Code; maximum authorized penalty of 90 days' confinement and $300 fine); *State* v. *Harrison*, 792 P.2d 779 (Ariz. Ct. App. 1990) (traffic offenses; maximum authorized penalty of four months' confinement and a fine).

We are aware of only one case in which a federal court of appeals has found that the circumstances were sufficient to overcome *Blanton*'s presumption that offenses subject to a six-month maximum prison term are petty. In *Richter* v. *Fairbanks*, 903 F.2d 1202, 1204-1205 (8th Cir. 1990), the court of appeals held that a jury trial was required for a DUI offense under a Nebraska city ordinance, where the maximum penalty was six months' incarceration, a $500 fine, and a 15-year driver's license revocation. In contrast to this case, however, the Eighth Circuit reached that result by applying this Court's analysis in *Blanton*. In finding that "a 15-year revocation is a substantial burden on the offender that is completely 'out-of-step' with a six month prison term," the court observed that "[t]he Supreme Court's analysis of the facts in *Blanton* supports our conclusion that adding the 15-year license revocation to the six month prison term resulted in a penalty severe enough to warrant a jury trial in this case." 903 F.2d at 1205. Thus, the decision below is as inconsistent with *Richter* as with the decisions discussed above.

The analysis applied by the Ninth Circuit in this case cannot be reconciled with the analysis followed by the other circuits that have addressed similar questions after *Blanton*. In light of the analysis followed by the other circuits in the cases cited above, there can be no doubt that a defendant charged with the offenses in question here would not have been entitled to a trial by jury in any of those circuits. Accordingly, review of the decision below is necessary to ensure that the Ninth Circuit applies the test articulated by this Court in the same manner as every other court of appeals that has addressed the jury trial issue since *Blanton*.

3. The decision below, if allowed to stand, will have a substantial adverse effect on the administration of justice in the Ninth Circuit. Each year, the government prosecutes thousands of petty offenses, including hundreds of DUI offenses, committed in federal parks and on other federal property, such as military bases. During the past decade, the government has prosecuted nationwide more than 700,000 petty offenses before United States Magistrates, including 83,258 such offenses during the last year for which figures are available (July 1, 1990, to June 30, 1991). Administrative Office of the United States Courts; *1986 Ann. Rep. of the Director* 36, Table S-26, at 130; Administrative Office of the United States Courts, *1991 Ann. Rep. of the Director* 107, Table 15, at 108. In addition, the United States Attorney for the Eastern District of California, the district where this case arose, reports that in 1991 4,731 petty offense charges were brought in his district alone, and that of those charges, 252 were DUIs brought under 36 C.F.R. 4.23(a)(1). Gov't Pet. for Reh'g and Suggestion for Reh'g En Banc 8-9. To ex-

tend the right to a trial by jury to even a small percentage of those cases would severely impede the ability of the federal criminal justice system to adjudicate petty offenses expeditiously, and as a result would significantly affect the ability of the courts to handle more serious criminal cases and civil cases as well. See *United States* v. *Bencheck*, 926 F.2d at 1517.[9]

The impact of the Ninth Circuit's ruling is not likely to be lessened by the fact that that court did not formally publish its opinion. Ordinarily, an unpublished opinion affects only the particular litigants in the case at bar. The Ninth Circuit's opinion in this case, however, is likely to have a far broader effect on the administration of justice at the trial level. District court judges and magistrates, who already face swollen dockets, can be expected to grant jury trials in DUI cases despite the decision's unpublished status in order to avoid a risk of reversal on this ground. Because an order granting a jury trial on demand is not appealable, the government will have no way in such cases of presenting the jury trial issue to the Ninth Circuit in another case seek-

[9] Since Congress has fixed the maximum sentence for all regulatory offenses defined by the Secretary of the Interior at six months' imprisonment and a $5,000 fine, see 16 U.S.C. 3; 18 U.S.C. 3571(b)(6) and (7), and since the Secretary has chosen to impose the maximum penalty available to him on all offenses in national parks, see 36 C.F.R. 1.3(a), under the Ninth Circuit's decision in this case jury trials could now be required for offenses such as failure to keep a pet on a leash that does not exceed six feet in length, 36 C.F.R. 2.15(a)(2), using a surfboard on a beach designated for swimming, 36 C.F.R. 3.22, and picnicking in a non-designated area, 36 C.F.R. 2.11, all of which carry the same maximum penalty at issue here.

ing a published decision on the question. The decision below therefore merits the attention of this Court.[10]

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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OCTOBER 1992

[10] This Court has granted review of unpublished court of appeals' decisions in other cases raising questions warranting review by this Court. *E.g.*, *Spectrum Sports, Inc.* v. *McQuillan*, cert. granted, No. 91-10 (unpublished opinion of the Ninth Circuit) (to be argued Nov. 10, 1992); *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished."); *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989); *Rose* v. *Clark*, 478 U.S. 570 (1986). That course is appropriate here, too.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-10212
D.C. No. CR-90-00154-EDP

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT

vs.

JERRY J. NACHTIGAL,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Eastern District of California
Edward D. Price, District Judge, Presiding

Submitted January 17, 1992**
San Francisco, California

MEMORANDUM*

[Filed Jan. 27, 1992]

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously found this case suitable for decision without oral argument. Fed. R. App. 34(a) and Ninth Circuit Rule 34-4.

Before: CHAMBERS, TANG, and PREGERSON, Circuit Judges

Jerry Nachtigal was convicted before a magistrate judge of driving a motor vehicle under the influence of alcohol in Yosemite National Park, in violation of 36 C.F.R. § 4.23(a)(1). This crime carries a maximum sentence of six months imprisonment, 36 C.F.R. § 1.3(a), a maximum fine of $5,000, 18 U.S.C. § 3571(b)(6), (e), and a maximum probationary period of five years during which the defendant is subject to a host of possible restrictions and conditions, 18 U.S.C. §§ 3561(b)(2), 3563(a)(1), (b). On appeal to the district court, Nachtigal argued that because of the severity of the potential sanctions, he had a right to a jury trial. The district court agreed, and reversed his conviction. The government now appeals the reversal, arguing that Nachtigal has no right to a jury trial.

We have jurisdiction under 18 U.S.C. § 3731, and we affirm.

DISCUSSION

Our constitution guarantees the right to trial by jury. U.S. Const. art. III, § 2, cl. 3; amend. VI. However, this right does not apply to all crimes. The Supreme Court has recognized "the common-law rule that 'petty' offenses may be tried without the intervention of a jury." *United States v. Craner*, 652 F.2d 23, 24 (9th Cir. 1981) (citations omitted). Several Supreme Court cases, culminating in *Blanton v. City of North Las Vegas, Nevada*, 109 S.Ct. 1289 (1989), have focused on offenses carrying maximum prison terms of six months as the dividing line between "petty" and "serious" offenses. At issue here is whether operating a motor vehicle under the influence of alcohol on federal property, which carries a maximum term of six months imprisonment, is a petty offense for which no right to a trial by jury exists.

In *Craner*, we addressed this same question. In that case, we held that a person accused of operating a motor vehicle under the influence of alcohol in Yosemite Park has a right to a jury trial. 652 F.2d at 27. In doing so, we emphasized two factors. First, the six month term of imprisonment is set by the Secretary of the Interior, and "is the severest one the Secretary may authorize." *Id.* at 25, citing 16 U.S.C. § 3. Second, we noted that seven states in this circuit guarantee a right to a jury trial in drunk driving cases. *Id.* at 27. We concluded in *Craner* that the crime of driving a motor vehicle while intoxicated is a serious one which merits trial by jury. *Craner* is indistinguishable in any legally meaningful sense from the case at hand, and controls this case.

The government urges us to abandon *Craner*, however, on the grounds that it has been overturned by *Blanton*. There, the Supreme Court held that the federal constitution does not require a jury trial where a state drunk driving statute imposes a maximum penalty of six months imprisonment and a fine of $1,000. 109 S.Ct. at 1293. The Court did not, however, adopt a bright line rule that an offense carrying a maximum prison term of six months or less is "petty." *Id.*

The Court in *Blanton* adopted a "somewhat imprecise" test which focuses on the totality of statutory sanctions in order to determine whether there is "a *legislative determination* that the offense in question is a 'serious' one." *Id.* (emphasis added). Because

of the Supreme Court's emphasis on the legislature's intent in establishing criminal penalties, we do not believe that *Blanton* is apposite to this case.

As *Craner* emphasized, the six month prison term is dictated by the Secretary of the Interior, not Congress. There is no controlling legislative determination here. Moreover, it would be error to construe the six month prison term as indicative of the pettiness of driving while intoxicated. As *Craner* noted, the general regulatory powers vested in the Secretary by Congress make six months the maximum sentence the Secretary can impose for any offense. Indeed, the fact that the Secretary imposed the harshest penalty available to him dictates the gravity of drunk driving. Finally, to the extent that legislative determinations are relevant, *Craner* points out that the legislatures of seven states in our Circuit have determined that drunk driving is a "serious" offense to which the right to a jury trial attaches.

CONCLUSION

Blanton is inapposite to this case. *Craner* remains the law of this Circuit. Nachtigal is therefore entitled to a jury trial. The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF CALIFORNIA

CR-F-90-27-DLB

UNITED STATES OF AMERICA, PLAINTIFF

v.

JERRY NACHTIGAL, DEFENDANT

MEMORANDUM OF DECISION AND RULING ON DEFENDANT'S MOTION FOR JURY TRIAL

[Filed Aug. 3, 1990]

This matter came regularly for hearing on June 29, 1990, in Courtroom No. 4 before the Honorable Dennis L. Beck, United States Magistrate on defendant's motion for jury trial.

Defendant and moving party was represented by his attorney, Stephen Mensel, Assistant Federal Defender.

The Government was represented by Assistant United States Attorney, Lawrence Lincoln.

The court having read and considered the points and authorities in support of and in opposition to de-

fendant's motion and having heard the argument of counsel in open court renders the following memorandum of decision and ruling on defendant's motion.

Defendant is before this court charged with driving under the influence, in violation of *36 CFR § 4.23 (a)(1). The maximum punishment for violation of 36 CFR § 4.23(a)(1)* is specified in 36 CFR § 1.3, as amended by U.S.C. § 3571(b)(6), and is six months in jail and/or a fine of up to $5,000.00.

The defendant argues that he is entitled to a jury trial since this offense is not properly characterized as a "petty offense". Defendant acknowledges that *Blanton v. City of North Las Vegas*, —— U.S. ——, 109 S.Ct. 1289 (1989) may have "arguably abandoned without specifically overruling" *United States v. Craner*, 652 F.2d 23 (9th Cir. 1981) which held that a defendant charged with the same offense as Mr. Nachtigal was entitled to a jury trial.

The court in *Craner* held that the defendant was entitled to a jury trial on a charge of driving under the influence, since the court could find no evidence that serious legislative consideration was given to the punishment for the offense which demonstrated a conscious decision that it should be treated as a petty offense. The court found that since the regulation, under which the charge was brought, was promulgated by the Secretary of Interior and carried the maximum punishment allowable for any violation of the secretary's regulations (the same punishment as for "digging for bait in a national park" or for "climbing Mt. Rushmore") that there was no evidence of a considered legislative determination; and, therefore, the defendant was entitled under the totality of the circumstances to a jury trial.

In *Blanton* the United States Supreme Court held that a defendant charged with driving under the influence in Nevada (an offense which carried a maximum possible punishment of 6 months in jail and/or a fine of up to $1,000) was not entitled to a jury trial. The offense of driving under the influence in Nevada carries additional penalties similar to California such as an automatic suspension of drivers license for 90 days, attendance, at defendant's own expense, at an alcohol abuse education program and increased penalties for repeat offenders.

While the Court in *Blanton* declined to hold that "an offense carrying a maximum prison term of six months or less automatically qualifies as a 'petty offense'" they did "find it appropriate to assume for purposes of the Sixth Amendment that society views such an offense as 'petty'." *Blanton*, 109 S.Ct. 1289 at 1293. The Court went on to hold that

> "A defendant is entitled to a jury trial in such circumstances (where the offense punishable by six months or less) only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one. This standard, albeit somewhat imprecise, should insure the availability of a jury trial in the rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonethe-less 'do not puncture the six months incarceration line'." *Blanton*, at p. 1293.

Defendant in his attempt to justify his request for a jury trial points to added penalties in the instant

case which justify departure from the presumption set forth in *Blanton* and a determination that the instant offense is a "serious" one. These additional penalties cited by defendant are:

(1) A fine of $5,000 plus the possibility that interest may be assessed thereon and a $10 penalty assessment;

(2) The possibility that the court, as a condition of probation, might order restitution;

(3) The possibility that, as a further condition of probation, that the defendant might be "incarcerated" for up to four and one half years in a federal community treatment center.

The court rejects each of defendant's arguments with respect to these added penalties. With respect to the first two additional penalties, neither the added fine and penalty assessment nor the restitution involved are sufficient to support a finding that there was a legislative determination that the offense was a "serious" offense. Each of these penalties attaches, by statute, to crimes designated by Congress as petty offenses.

As to defendant's third argument, that he might be "incarcerated" in a community treatment center for up to four and one half years as a condition of probation, it is rejected as simply being incorrect. Defendant acknowledges that under *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990) a defendant is entitled to custody time credits for time spent (in that case only between 7 p.m. and 5 a.m.) in a treatment center as a condition of pretrial release. Nevertheless, he argues that the court could impose "incarceration" in a community treatment center as a condition of probation for a period of up to four and one half years.

Defendant's argument is both incorrect and disingenuous. Defendant cites no authority for the proposition that custodial alcohol or drug treatment may be imposed as a condition of probation for a time period in excess of the sixth month maximum period of incarceration. Indeed the holding in *Brown v. Rison* indicates quite to the contrary, that a defendant would be entitled to time credits for any such ordered treatment which significantly limited the defendant's freedom and could be properly termed incarceration.

For the foregoing reasons defendant's motion for jury trial is hereby denied.

DATED: 8/3/90

/s/ Dennis L. Beck
United States Magistrate

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CR F-90-154 EDP

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

JERRY J. NACHTIGAL,
DEFENDANT-APPELLANT

MEMORANDUM DECISION RE:
APPELLANT'S RIGHT TO A JURY TRIAL

[Filed Mar. 29, 1991]

Defendant was charged by information with a violation of 36 CFR 4.23(a)(1), and 4.23(a)(2)[1] in

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[1] Operating under the influence of alcohol or drugs.

(a) Operating or being in actual physical control of a motor vehicle is prohibited while:

(1) Under the influence of alcohol, or a drug, or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation; or

(2) The alcohol concentration in the operator's blood or breath is 0.10 grams or more of alcohol per 100 milliliters of blood or 0.01 grams or more of alcohol per 210 liters of breath. *Provided however*, that if State law that applies to operating a motor vehicle while under the influence of alcohol establishes more restrictive limits of alcohol concentration in the operator's blood or breath, those limits supersede the limits specified in this paragraph.

Yosemite National Park. When the defendant appeared before Magistrate-Judge Pitts in Yosemite on January 23, 1990, he declined the Magistrate's jurisdiction. However, when he appeared before Magistrate-Judge Beck on or about March 29, 1990, he consented to be tried before a magistrate-judge.

Defendant then moved for a jury trial. His motion was denied. Defendant proceeded to trial before Magistrate-Judge Beck and was convicted. Defendant filed this appeal.

The sole issue on appeal is the propriety of the ruling of the magistrate-judge that defendant was not entitled to a trial by jury.

In *United States v. Craner*, 652 F.2d 23 (9th Cir. 1981), the Ninth Circuit held that defendant Craner was entitled to a jury trial on charges of driving under the influence of alcohol in Yosemite National Park. The penalty imposed on Craner's violation and upon appellant, is the same. *See* 36 CFR § 1.3(a):

> Penalties.
>
> (a) A person convicted of violating a provision of the regulations contained in Parts 1 through 5, 7, 12 and 13 of this chapter, within a park area not covered in paragraphs (b) or (c) of this section, shall be punished by a fine not exceeding $500 or by imprisonment not exceeding

6 months, or both, and shall be adjusted to pay all costs of the proceedings.

In *United States v. Craner, supra*, at 26-27, the court held that a defendant charged with driving under the influence was entitled to a jury trial, stating:

> Federal and state precedent and practices counsel ranking DUI as a "serious" crime. In 1930 the Supreme Court held that the analogous offense of reckless driving was a serious offense within the constitutional guarantee of trial by jury. *See District of Columbia v. Colts*, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930). The court in *Colts* reasoned that reckless driving was both indictable at common law and *malum in se*, and hence, serious.
>
> There is no legally meaningful distinction between the present case and *Colts*. The government, therefore, understandably argues that *Colts* is superannuated and, as precedent, abandoned. Yet *Colts* was cited by Justice White without disapproval in *Baldwin*—the very case that supposedly doomed "the nature of the offense" as the determinant of the right to a jury trial. *See Baldwin, supra*, 399 U.S. at 69 n. 6, 90 S.Ct. at 1888 n. 6 (plurality opinion). This Court has rejected the argument that the *Colts* line of cases should not be followed; the Supreme Court has never repudiated *Colts*, although it has had many opportunities to do so. *United States v. Sanchez-Meza, supra*, 547 F.2d at 463-64. *See also United States v. Stewart*, 568 F.2d 501, 503 (6th Cir. 1978); *United States v. Woods*, 450 F.Supp. 1335, 1342 (D.Md.1978); *Brady v. Blair*, 427 F.Supp. 5, 9 (S.D.Ohio 1976).
>
> At least seven of the states in this Circuit guarantee the DUI defendant the right to a jury trial. This is a better objective gauge of the common perception of the gravity of the offense than the broad formula for classifying crimes found in 18 U.S.C. § 1. It accords with the relevant state and federal practice that Craner have the jury trial he seeks.

In 1989, the United States Supreme Court decided *Blanton v. City of North Las Vegas*, 489 U.S. ——, 103 L.Ed.2d 550, 109 S.Ct. —, (1989). In *Blanton, supra*, two petitioners had been charged with driving an automobile under the influence of alcohol in a Nevada court. Each was a first time offender. The Nevada state statute prescribed the following punishment upon conviction:

1. A minimum of two (2) days imprisonment and a maximum of six months imprisonment;
2. Alternatively, the trial court could order the defendant to perform 48 hours of work for the community while dressed in distinctive garb, which identifies the wearer as a driving under the influence offender;
3. A fine ranging from $200 to $1,000;
4. Loss of his driver's license for 90 days; [2] and
5. The convicted individual must attend, at his own expense, an alcohol abuse program.

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[2] The convicted individual could receive a restricted license after the expiration of 45 days, which would permit travel to and from work, and to obtain food and medical care.

The lower Nevada courts had ruled differently as to the entitlement of the two petitioners to a jury trial. The Nevada Supreme Court ruled that neither was so entitled. The Blanton case arose by certiorari from the Nevada Supreme Court decision as to each petitioner. Justice Marshall, writing for a unanimous court, held that:

> Applying these principals here, it is apparent that petitioners are not entitled to a jury trial. The maximum authorized prison sentence for first-time DUI offenders does not exceed six months. A presumption therefore exists that the Nevada legislature views DUI as a "petty" offense for purposes of the Sixth Amendment. Considering the additional statutory penalties as well, we do not believe that the Nevada Legislature has clearly indicated that DUI is a "serious" offense.
>
> In the first place, it is immaterial that a first-time DUI offender may face a minimum term of imprisonment. In settling on six months imprisonment as the constitutional demarcation point, we have assumed that a defendant convicted of the offense in question would receive the *maximum* authorized prison sentence. It is not constitutionally determinative, therefore, that a particular defendant may be required to serve some amount of jail time *less* than six months. Likewise, it is of little moment that a defendant may receive the maximum prison term because of the prohibitions on plea bargaining and probation. As for the 90-day license suspension, it, too, will be irrelevant if it runs concurrently with the prison sentence, which we assume for

> present purposes to be the maximum of six months.
>
> We are also unpersuaded by the fact that, instead of a prison sentence, a DUI offender may be ordered to perform 48 hours of community service dressed in clothing identifying him as a DUI offender. Even assuming the outfit is the source of some embarrassment during the 48-hour period, such a penalty will be less embarrassing and less onerous than six months in jail. As for the possible $1,000 fine, it is well below the $5,000 level set by Congress in its most recent definition of a "petty" offense, 18 USC § 1 (1982 ed. Supp. IV [18 USCS § 1], and petitioners do not suggest that this congressional figure is out of step with state practice for offenses carrying prison sentences of six months or less. Finally we ascribe little significance to the fact that a DUI offender faces increased penalties for repeat offenses. Recidivist penalties of the magnitude imposed for DUI are commonplace and, in any event, petitioners do not face such penalties here.
>
> Viewed together, the statutory penalties are not so severe that DUI must be deemed a "serious" offense for purposes of the Sixth Amendment. It was not error, therefore, to deny petitioners jury tral. Accordingly, the judgment of the Supreme Court of Nevada is affirmed.

Blanton, *supra*, 103 L.Ed.2d at 557-58.

Blanton represents a marked departure from prior Supreme Court precedents.

In *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968), the court held that a

defendant in a Louisiana Court, charged with a misdemeanor of simple battery, punishable by a $300 fine, or imprisonment for 2 years, or both, was entitled to a jury trial. The constitutional analysis used by the Court was the right guaranteed by the Fourteenth Amendment to the Constitution.

In *Baldwin v. New York*, 399 U.S. 66, 26 L.Ed.2d 437, 90 S.Ct. 1886 (1969), the petitioner had been denied a jury trial by the New York City Criminal Court. He was charged with the misdemeanor of "jostling". The Act that created the New York City Criminal Court provided that no jury trials would be had in that court.

Five members of the court agreed that Baldwin was entitled to a jury trial, although the maximum penalty was one year imprisonment. Five judges concurring with Justice White's decision could not agree on the grounds for the decision.

Some circuits viewed *Baldwin* as developing a "bright-line" test for determining whether a particular offense would entitle a defendant to a jury trial:

> The Supreme Court has adopted a bright-line test for determining whether a crime is "serious." An offense carrying a maximum penalty in excess of six months imprisonment is considered sufficiently severe to be automatically categorized as "serious." *Baldwin*, 399 U.S. at 69, 90 S.Ct. at 1888.

United States v. Jenkins, 780 F.2d 472, 473 (4th Cir. 1986).

However, the Supreme Court in *Blanton v. Las Vegas, supra*, made it clear that cases where the possible penalty exceeded six months were sufficiently

severe to make the case triable by jury.[3] Where, as here, that "bright-line" is not reached, the defendant must demonstrate that the collateral consequences of conviction are so severe they elevate the offense to the category of "serious." The Supreme Court rejected the possibility that the convicted offender may be required to perform 48 hours of community service in a distinctive costume. The Court also was not impressed by the $1,000 fine, and the fact that a first offender faced increased penalties on a second or more frequent offense.[4]

These comments by the high court are at variance with the Ninth Circuit precedent of *United States v. Craner, supra.* (See Judge Sneed's concurring opinion). *See* California Vehicle Code section 23152, 23165, 23166, 23167, 23170, 23171, 23175. Understandably, the Supreme Court, dealing as it was with a Nevada case, did not address these sections, or analyze their effect upon its decision. However, *United States v. Craner, supra*, remains the law of this circuit.

It should be noted that in 1984, Congress reclassified federal offenses in 18 U.S.C. section 3559 as follows:

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[3] It should be noted that the maximum penalty in *United States v. Craner*, 652 F.2d 28 (9th Cir. 1981) is the same that is applicable here, i.e., $500 fine; imprisonment not to exceed six (6) months, plus payment of costs.

[4] Implicit in the Supreme Court opinion is the suggestion that all of these facts were known to the Nevada legislature when they determined that first offenders charged with driving under the influence were not entitled to jury trials. The Supreme Court did state that the opinion of the legislature concerning this matter was entitled to great weight.

(a) Classification An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is—

(1) life imprisonment, or if the maximum penalty is death, as a Class A felony;

(2) twenty-five years or more, as a Class B felony;

(3) less than twenty-five years but ten or more years, as a Class C felony;

(4) less than ten years but five or more years, as a Class D felony;

(5) less than five years but more than one year, as a Class E felony;

(6) one year or less but more than six months, as a Class A misdemeanor;

(7) six months or less but more than thirty days, as a Class B misdemeanor;

(8) thirty days or less but more than five days, as a Class C misdemeanor; or

(9) five days or less, or if no imprisonment is authorized, as an infraction.

(b) *Effect of classification.* An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation, except that, the maximum term of imprisonment is the term authorized by the law describing the offense.

Beginning on November 1, 1987, Congress mandated that the courts should sentence according to

the Sentencing Guidelines developed by the Sentencing Commission:

> Application of guidelines in imposing a sentence. The court shall impose a sentence of the kind, and within the range, referred to in section (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offender other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

Title 18 of the United States Code section 3553(b).

As of this date, the Sentencing Commission has not formed a sentencing guideline for "driving under the influence," specifically, or Class B misdemeanors, generally.

In 18 U.S.C. section 3571(b), Congress fixed the range of fines for each class of crime:

Fines for individuals. Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (d) of this section;

(3) for a felony, not more than $250,000;

(4) for a misdemeanor resulting in death, not more than $250,000;

(5) for a Class A misdemeanor that does not result in death, not more than $100,000;

(6) for a Class B or C misdemeanor that does not result in death, not more than $5,000; or

(7) for an infraction, not more than $5,000.

The Court notes that using the analysis announced in *Blanton v. Las Vegas, supra*, something less than a clear picture emerges. More important, however, *United States v. Craner, supra*, is the law of this circuit.

Since *Blanton, supra*, did not expressly overrule *United States v. Craner, supra*, this Court must follow it. Accordingly, the judgment is reversed.

DATED: March 28, 1991

/s/ Edward Dean Price
EDWARD DEAN PRICE
Senior United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-10212

D.C. No. CR-90-00154-EDP

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT

vs.

JERRY J. NACHTIGAL,
DEFENDANT-APPELLEE

ORDER

[Filed Jul. 10, 1992]

Before: CHAMBERS, TANG, and PREGERSON, Circuit Judges

Judges Chambers, Tang, and Pregerson voted to deny the petition for rehearing. Judges Tang and Pregerson voted to reject the suggestion for rehearing en banc and Judge Chambers recommends such rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

1. Article III, § 2, Cl. 3 of the Constitution provides in part:

> The trial of all crimes, except in cases of impeachment, shall be by jury * * * .

2. The Sixth Amendment to the Constiution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * * .

3. 16 U.S.C. 3 provides in part:

> The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section * * * shall be punished by a fine of not more than $500 or imprisonment for not exceeding six month or both, and be adjudged to pay all costs of the proceedings. * * *

4. 18 U.S.C. 3571(b)(6) and (e) provides:

> (b) Fines for individuals.—Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—
>
> * * * * *

> (6) for a Class B or C misdemeanor that does not result in death, not more than $5,000[.]
>
> * * * * *
>
> (e) Special rule for lower fine specified in substantive provision.—If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

5. 36 C.F.R. 1.3(a) provides:

> A person convicted of violating a provision of the regulations contained in Parts 1 through 5, 7, 12 and 13 of this chapter, within a park area not covered in paragraphs (b) or (c) of this section, shall be punished by a fine not exceeding $500 or by imprisonment not exceeding 6 months, or both, and shall be adjudged to pay all costs of the proceedings.

6. 36 C.F.R. 4.23(a)(1) provides in part:

> (a) Operating or being in actual physical control of a motor vehicle is prohibited while:
>
> (1) Under the influence of alcohol, or a drug, or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation[.]

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